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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS CARTAGENA,

Defendant and Appellant.

B268684

(Los Angeles County
Super. Ct. No. PA065592)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed as modified.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Jesus Cartagena's appointed attorney filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 that raises no issues and asks us to independently review the record. We invited defendant to submit a supplemental brief and he has done so, presenting various contentions of error (in cursory fashion, without citation to applicable authority) that in his view warrant reversal. In the remainder of this opinion, we summarize the facts and explain why defendant's claims of error lack merit.

The Los Angeles County District Attorney charged defendant with second degree robbery in violation of Penal Code section 211¹ (count 1 of the Amended Information) and assault with a firearm in violation of section 245(a)(2) (count 2 of the Amended Information). In connection with the robbery charge in count 1, the District Attorney further alleged defendant personally used a firearm within the meaning of section 12022.53(b) and personally discharged a firearm within the meaning of section 12022.53(c). As to the assault with a firearm charge in count 2, the District Attorney further alleged defendant personally used a firearm within the meaning of section 12022.5(a).

The charges against defendant were predicated on evidence that defendant accosted a man working at a recycling station and demanded money while pointing a gun at the victim's head. The victim lunged for the gun and a struggle ensued. Defendant called out to a male accomplice, and that man ran over and hit the victim several times in the head, causing the victim to temporarily lose consciousness. When the victim came to, he

¹ Undesignated statutory references that follow are to the Penal Code.

could see the men “going through stuff” in the shed where he had been working; the victim then ran across the street and called 911. A subsequent search of the shed revealed defendant and his accomplice had taken \$1,000 in cash.

The case was tried to a jury. Among other things, the prosecution presented (1) testimony from the victim, including his prior identification of defendant in a six-pack photo lineup; (2) evidence that DNA from blood found in the shed matched defendant’s DNA; and (3) video surveillance footage that depicted a portion of the fight between defendant and the victim (a gun was not visible in the footage). Defendant testified in his own defense and admitted he got into a fight with the victim. Defendant claimed, however, that he did not have a gun, he never demanded money from the victim, and he did not take any money from the shed.

The jury convicted defendant on both charges. The jury found true the allegations, pursuant to sections 12022.53(b) and 12022.5(a), that defendant personally used a firearm in the commission of the offenses. The jury found not true the allegation that defendant discharged a firearm. The trial court sentenced defendant to 15 years in state prison on the robbery count, consisting of the upper term of five years plus ten years for the section 12022.53(b) use of a firearm enhancement. The court imposed and stayed sentence for the assault with a firearm conviction, pursuant to section 654. The court imposed various fines and assessments, but the court’s oral pronouncement of sentence did not include a \$29 “Penalty Assessment Fine” that is reflected on the abstract of judgment.

Defendant advances 15 contentions of error, which for purposes of analysis, we group into the following categories: (1) assertions of instructional error, (2) claims of ineffective assistance of counsel, (3) contentions related to the sufficiency of the evidence, and (4) claims asserting a jury finding and the trial judge's response to a jury question revealed one or more of the charges against him were infirm. All of defendant's claims fail.

Defendant contends the trial court should have instructed the jury on simple assault or battery as a lesser included offense of robbery under the accusatory pleading test. The contention fails because simple assault and battery are not lesser included offenses of robbery even under that test and because there was no substantial evidence warranting simple assault or battery instructions. (*People v. Wolcott* (1983) 34 Cal.3d 92, 99-100; *People v. Wright* (1996) 52 Cal.App.4th 203, 210-11; see also *People v. Breverman* (1998) 19 Cal.4th 142, 162.) Defendant additionally contends the assault with a firearm instruction given, CALCRIM No. 875, confused the jury by stating both that the People are not required to prove defendant actually touched someone and that the People are not required to prove defendant intended to use force against someone when he acted. We see no possibility of confusion, and both elements of the instruction are proper. (*People v. Golde* (2008) 163 Cal.App.4th 101, 122-23; *People v. Flores* (2007) 157 Cal.App.4th 216, 220-21.)

Next, and charitably read, defendant's supplemental brief asserts his trial attorney was constitutionally ineffective for a host of reasons: she should have explored when the dried blood stains found in the shed were left there, she should have objected to the prosecution's use of a "surrogate expert" to testify about obtaining a reference DNA sample from defendant, she should

have “conduct[ed her] own independent examination of the discovered blood stains, she should have “argue[d] against the [F]ourth [A]mendment violation when the reference sample was taken absent a court order,” she should have moved to dismiss the charges because the video surveillance footage did not show defendant with a gun, and she should have objected to the “prosecution’s continued use of leading the witness” Each of these claims fails under both prongs of the *Strickland v. Washington* (1984) 466 U.S. 668 standard we employ when evaluating a claim of ineffective assistance of counsel on direct appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-67; *Strickland*, 466 U.S. at 694 [“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”].)

As to defendant’s claims concerning the sufficiency of the evidence, he asserts: the evidence at trial failed to establish “any willingness on the part of [defendant] to assault the victim,” the prosecution’s use of DNA statistics and probability “provided no evidence other than a number in establishing identity,” the robbery conviction is infirm because the money was taken after the victim fled the scene, and the trial court should have granted defendant’s section 1118.1 motion at the close of the prosecution’s case. Under the governing standard we apply for evaluating the sufficiency of the evidence, defendant’s claims fail.² (*People v.*

² Viewed in the light most favorable to the verdict, there was evidence defendant took the money before or at the point when the victim regained consciousness and saw defendant “going through stuff” in the shed. In any event, and contrary to defendant’s contention, the money need not have been taken

Williams (2015) 61 Cal.4th 1244, 1281 [viewing the evidence in the light most favorable to the prosecution, we decide whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt]; see also *People v. Jones* (2013) 57 Cal.4th 899, 963-64 [testimony of a single witness suffices to support a conviction unless physically impossible or inherently improbable]; *People v. Richardson* (2008) 43 Cal.4th 959, 1030.)

As to the last category of claims we have defined for purposes of analysis, defendant contends (1) the jury's not true finding on the allegation he discharged a firearm compels dismissal of the assault with a firearm count, and (2) the trial court's "answer to the jurors as it refers to 'personally used' a firearm is evidence the Court must remove one of the allegations from either count when the Court reads the jurors were informed that the 'personally used' allegation applied to only one of the counts (during the commission of a robbery or assault with a firearm)" The first contention fails because the jury's not true finding is not inconsistent with its verdict (one can assault another with a firearm without discharging it (see *People v. Raviart* (2001) 93 Cal.App.4th 258, 263)) and because the guilty verdict on the assault with a firearm charge would stand even if it were inconsistent (*People v. Avila* (2006) 38 Cal.4th 491, 600 ["As a general rule, inherently inconsistent verdicts are allowed

during defendant's use of force against the victim. Rather, defendant need only have formed *the intent* to take the money during his use of force or fear—and there was adequate evidence for the jury to have found such an intent. (*People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348-49.)

to stand”]). Defendant’s second contention fails because the trial court’s answer to the jury’s question was proper; the court’s response correctly noted that the jury need only decide the section 12022.53(c) personal discharge of a firearm enhancement in connection with the robbery charge in count 1 because that was the only count in which such an enhancement was alleged (as opposed to the personal use enhancements, which were alleged as to both counts).³

Having considered defendant’s contentions of error and conducted our own examination of the record, we are satisfied defendant’s appellate counsel has complied with the responsibilities of counsel and—with one minor exception—no arguable issue exists.⁴ (*Wende*, 25 Cal.3d at 441; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278-82; *People v. Kelly* (2006) 40 Cal.4th 106, 122-24.) The oral pronouncement of sentence controls, and so the reference to the imposition of a \$29 Penalty Assessment Fine in the abstract of judgment must be stricken. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

³ Defendant’s supplemental brief includes one additional contention we have not yet addressed: “The assault if any in this case is incidental to the alleged robbery.” The contention of error is unintelligible, and we see no need to discuss it further.

⁴ Defendant has appointed counsel, and his pro se motion for appointment of counsel is denied.

DISPOSITION

The judgment is modified to strike the \$29 Penalty Assessment Fine. The judgment is affirmed in all other respects. The clerk of the superior court shall prepare an amended abstract of judgment deleting the \$29 Penalty Assessment Fine and deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIN, J.^{*}

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.